Divian Michael a/l Augustin Paes v Mohd Falil bin Md Amin & Anor

HIGH COURT (IPOH) — CIVIL APPEAL NO 12B-1–01 OF 2012
HARMINDAR SINGH J
4 OCTOBER 2012

Tort — Road accident — Claim for damages — Appeal from sessions court — Collision between motorcycle and motor taxi — Diverging versions from parties — Whether liability should be apportioned equally between parties — Loss of earnings awarded for four months based on medical leave chits — Appeal against liability and quantum

A collision occurred between the motorcycle ridden by the appellant ('the plaintiff') and a motor taxi resulting in the former suffering from serious injuries. The plaintiff claimed for damages for the negligence of the first defendant, the taxi driver. In the sessions court, diverging versions were brought forth. The plaintiff alleged that he was riding his motorcycle from the direction of Seri Manjung towards the direction of Sitiawan when the defendants' motor taxi suddenly reversed into the path he was traveling on. On the other hand, the defendants claimed that the motor taxi was stationary and was alighting passengers when the plaintiff collided into the rear of the motor taxi. The learned sessions court judge went on straight to discuss on whether the plaintiff had contributed to the accident and held that the liability was to be apportioned equally between the plaintiff and the defendants. The learned trial judge accepted that the plaintiff was earning at least RM600 per month as a welder at the time of the accident. He also awarded damages for pain and suffering and for loss of earnings. However, the plaintiff was unhappy that the learned trial judge only awarded loss of earnings for four months on the basis of the medical leave chits. The plaintiff, being dissatisfied with this decision appealed on both liability and quantum.

Held, allowing the appeal:

(1) The learned trial judge had not only failed to appreciate the sum total of the evidence but had come to a finding which was against the weight of evidence. The appeal on liability was allowed and the defendants were adjudged to be wholly negligent. With the motor taxi suddenly reversing into his path some 21 feet in front of the plaintiff, he could not have been expected to take such evasive action as suggested by the learned judge. That would be imposing an onerous duty on him. His duty was only to act reasonably under the circumstances. It was common sense that the

rider of a smaller vehicle would naturally and instinctively take evasive action to avoid a collision with a larger vehicle. The plaintiff was placed in the agony of the moment. The reversing motor taxi was much too close for the plaintiff to take evasive action. It would be unfair now to pin any negligence on him (see paras 11–12).

(2) The learned trial judge failed to consider the specialist reports on the injuries and disabilities sustained by the plaintiff. The plaintiff had not recovered sufficiently to begin any sort of employment and this should have been taken into account. The appeal in this regard was allowed. The plaintiff was accordingly entitled to pre-trial loss of earnings at RM600 per month for 29 months, totaling up to RM17,400 (see paras 14 & 17).

[Bahasa Malaysia summary

Pelanggaran terjadi di antara motosikal yang ditunggang oleh perayu ('plaintif') dan teksi mengakibatkan perayu mengalami kecederaan yang serius. Plaintif menuntut untuk kecuaian terhadap defendan pertama, pemandu teksi. Di mahkamah sesyen, versi berlainan dikemukakan. Plaintif mendakwa yang dia menunggang motosikalnya dari arah Seri Manjung ke arah Sitiawan apabila teksi defendan-defendan tiba-tiba mengundur masuk ke jalan yang dilaluinya. Defendan-defendan sebaliknya mendakwa bahawa teksi tidak bergerak dan sedang menurunkan penumpang-penumpang apabila plaintif melanggar bahagian belakang teksi tersebut. Hakim mahkamah sesyen terus membincangkan sama ada plaintif telah menyumbangkan kepada kemalangan tersebut dan memutuskan liabiliti dibahagikan sama rata di antara plaintif dan defendan-defendan. Hakim perbicaraan yang bijaksana menerima yang plaintif memperolehi sekurang-kurangnya RM600 sebulan sebagai pengimpal pada masa kemalangan. Dia juga diawardkan ganti rugi untuk kesakitan dan penderitaan dan untuk kehilangan pendapatan. Plaintif walau bagaimanapun tidak berpuas hati kerana hakim perbicaraan yang bijaksana hanya mengawardkan kehilangan pendapatan untuk empat bulan atas dasar surat-surat cuti sakit. Plaintif, tidak berpuas hati dengan keputusan ini merayu ke atas kedua-dua liabiliti dan kuantum.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan yang bijaksana bukan sahaja gagal untuk meneliti jumlah keterangan tetapi mencapai dapatan yang bertentangan dengan berat keterangan. Rayuan atas liabiliti dibenarkan dan defendan-defendan dihukum kerana kecuaian secara keseluruhan. Dengan teksi tiba-tiba memasuki jalannya kira-kira 21 kaki di hadapan plaintif, dia tidak boleh dijangkakan untuk mengambil tindakan mengelak seperti yang dicadangkan oleh hakim yang bijaksana. Ini akan mengenakan tugas membebankan ke atasnya. Kewajipannya hanya untuk bertindak secara munasabah di bawah keadaan tersebut. Adalah rasional bahawa penunggang kenderaan yang lebih kecil akan secara

semulajadi dan naluri untuk mengambil tindakan mengelak untuk mengelak pelanggaran dengan kenderaan yang lebih besar. Plaintif diletakkan dalam keadaan sulit yang amt sangat. Teksi yang mengundur tersebut adalah terlalu dekat untuk plaintif mengelak. Akan menjadi tidak adil sekarang untuk mengenakan apa-apa kecuaian ke atas plaintif (lihat perenggan 11–12).

(2) Hakim perbicaraan yang bijaksana gagal untuk mempertimbangkan laporan-laporan pakar dan kurang upaya yang dialami oleh plaintif. Plaintif masih belum baik secukupnya untuk memulakan apa-apa jenis pekerjaan dan ini patut diambil kira. Rayuan berkaitan ini dibenarkan. Plaintif oleh itu berhak kepada pra-perbicaraan kehilangan pendapatan pada RM600 sebulan untuk 29 bulan, berjumlah kepada RM17,400 (lihat perenggan 14 & 17).]

Notes

For a case on claim for damages, see 12 *Mallal's Digest* (4th Ed, 2011) para 1939.

Cases referred to

Govinda Raju & Anor v Laws [1966] 1 MLJ 188 (refd)

Brijnandan Singh Bhar (G Dorai & Co) for the appellant/plaintiff.
D Ramamoorthy (Ng Chee Keong & Co) for the defendants/respondents.

Harmindar Singh J:

BACKGROUND

[1] On 11 March 2009, a collision occurred between motorcycle AFH 1355 and motor taxi AT 3385. As a result of the accident, the plaintiff (now the appellant), who was riding the said motorcycle, suffered serious injuries. He filed a claim for damages on account of the negligence of the first defendant, the taxi driver. After a trial, the learned sessions court judge decided that liability is to be apportioned equally between the plaintiff and the defendants. He also awarded damages for pain and suffering and for loss of earnings. The plaintiff, being dissatisfied with this decision, now appeals on both liability and quantum. For convenience, the parties will be referred to as they were in the trial court.

LIABILITY

[2] According to the plaintiff, he was riding his motorcycle from the direction of Seri Manjung towards the direction of Sitiawan when the defendants' motor taxi suddenly reversed into his path of travel. The

defendants' pleaded case, on the other hand, was that the motor taxi was stationary alighting passengers when the plaintiff collided into the rear of the motor taxi.

[3] Since divergent versions were being put forward which was not unusual in such cases, it was the duty of the sessions court judge to sieve through the evidence and come to a finding as to which version was the more plausible one.

[4] Having perused the grounds of decision of the learned judge, there is unfortunately no such finding. Instead the learned judge appears to have embarked right away to discuss whether the plaintiff had contributed to the accident. This was clearly the wrong approach. The learned judge ought to have decided, one way or another, as to which version he accepted by giving reasons for his conclusion. He cannot avoid this fundamental duty. The consideration of contributory negligence of the plaintiff would follow after the determination of the defendant's liability.

[5] Now the plaintiff gave evidence at the trial as follows:

> Semasa saya membawa motosikal ke Sitiawan, dan nampak satu teksi mengundur, saya nak lepas taksi itu, dia mengundur dan langgar saya bahagian kanan saya. Semasa teksi mengundur saya cuba elak ke kiri, tapi tak sempat dia terus melanggar saya.

[6] The defendants however did not turn up at the trial. No reason for their absence was provided. The evidence of the plaintiff therefore stood unrebutted. There was an attempt to introduce the police report of the first defendant, the driver of the motor taxi, through the investigating officer. However, unless there is a concession or an admission, the police report carries no weight since there was no opportunity for cross-examination due to the absence of the defendants at the trial.

[7] The version of the plaintiff, in any event, was not inconsistent with the silent evidence of the sketch-plan and the damage to the vehicles as recorded by the investigating officer. The rear left tail light and the fender were damaged. This would be consistent with the fact that the motor taxi had reversed at an angle. There was therefore damage only at the left edge of the rear of the motor taxi. This also explains why the motorcycle was found in front of the motor taxi after the collision with all the scratch marks and broken glass in front of the motor taxi rather than behind it.

[8] The learned judge sessions seems to have focused on the negligence of the plaintiff as follows:

> In his own evidence, SP2 admitted that he noticed that the said motortaxi was reversing. However SP2 keep on riding his bike and tried to swerve to the left. He could not avoid the motortaxi and that is when the accident occurred. There are so many questions raised by both counsel pertaining to the motorcycle lane. In my opinion, it doesn't matter whether lane A or even B—C is a motorcycle lane. The fact is the plaintiff did rode alone lane A and he already noticed about the said motortaxi at about 21 feet. He should take notice of what would happen next as the taxi was reversing. It is my view that the plaintiff had failed to keep a proper look out at that day. Should he reduce his speed and keep a proper look out, this accident would not be happening, hence there is an element of contributory negligence on the part of the plaintiff.

[9] Now it is noteworthy that the plaintiff had denied any failure on his part to keep a proper lookout for the motor taxi and this evidence stood unrebutted by the defendants due to their failure to attend trial. In any event, the plaintiff could hardly be faulted when he saw the motor taxi reversing some 21 feet away. It was the motor taxi that had created the dangerous situation. As testified by the investigating officer, the motor taxi was not allowed to drop passengers at that particular place.

[10] In *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188, Raja Azlan Shah J (as His Royal Highness then was) observed as follows at p 190:

> To my mind when a plaintiff is perplexed, or agitated when exposed to danger by the wrongful act of the defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. To that extent, I am satisfied that the plaintiff has so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence. I therefore hold that there is no contributory negligence on the part of the plaintiff.

[11] Similarly in the instant case, with the motor taxi suddenly reversing into his path some 21 feet in front of him, he could not have been expected to take such evasive action as suggested by the learned judge. That would be imposing an onerous duty on him. His duty is only to act reasonably under the circumstances. It is common sense that the rider of a smaller vehicle will naturally and instinctively take evasive action to avoid a collision with a larger vehicle unless of course he has taken leave of his senses or wishes to end his life. To my mind, the instant action was a classic example of the plaintiff being placed in the agony of the moment. The reversing motor taxi was much too close for the plaintiff to take evasive action. It would be unfair now to pin any negligence on him.

[12] In the circumstances, on the question of liability, I think the learned trial judge had not only failed to appreciate the sum total of the evidence but

had come to a finding which was against the weight of evidence. The appeal on liability is therefore allowed. The defendants are adjudged to be wholly negligent in this accident.

QUANTUM

[13] The appeal on quantum is only with regard to loss of earnings. The learned trial judge accepted that the plaintiff was earning at least RM600 per month as a welder at the time of the accident. There was no quarrel with this finding. However, the plaintiff was unhappy that the learned trial judge only awarded loss of earnings for fourth months on the basis of the medical leave chits.

[14] In this regard, the learned trial judge had quite correctly considered the duty of the plaintiff to mitigate his losses but unfortunately, he failed to consider the specialist reports on the injuries and disabilities sustained by the plaintiff. The specialist report of the defendants dated 24 June 2011 stated that the plaintiff suffered the following injuries:

(i) Closed fracture midshaft right tibia

(ii) Closed fracture distal end right tibia

(iii) Closed fracture proximal 3rd right femur

(iv) Closed fracture right lateral malleolus.

[15] As at 24 June 2011, when the plaintiff was examined, it was noted by the specialist that there was only partial union of the fracture femur. The disabilities noted were as follows:

(1) There was a real shortening of the right leg by 0.5 cm at the femoral segment. As a result, he walked with a slight limping gait.

(2) There was moderate wasting of the right thigh and right calf muscle with decreased in girth by 2 cm and 1 cm respectively.

(3) There was mild stiffness of the right hip joint with decreased in external rotation by 20 degrees.

(4) There was mild stiffness of the right ankle joint with decreased in dorsiflexion by 10 degrees. As a result, he was unable to squat normally.

(5) The right femur fracture has partially united only. An operation consisting of bone grafting and dynamisation is required to promote bony union. The approximate medical cost is RM5,000.00. After this surgery, the right leg will still be short by 0.5 cm.

(6) There were multiple ugly scars over the right thigh and right leg.

[16] And in conclusion it was noted:

> This patient said that he was working as a welder prior to the above injuries. With the above permanent disabilities, he will be unable to perform any strenuous menial work which involves prolonged standing, walking or squatting. Therefore, he will be unable to continue in his previous job or any heavy menial job. He is more suited to perform a sedentary desk job.

[17] Now the plaintiff had testified in court that he did not go back to work as he cannot do any heavy work. In the face of the defendants' own specialist report outlining the injuries and disabilities sustained, and especially considering the fact that the femur fracture had only partially united and required further surgery, it was obvious that the plaintiff had not recovered sufficiently to begin any sort of employment. The learned trial judge ought to have taken this into account instead of relying solely on the medical leave chits. I would therefore allow the appeal in this regard. The plaintiff is accordingly entitled to pre-trial loss of earnings at RM600 per month for 29 months. The total comes to RM17,400.

[18] There is now no dispute that the plaintiff can only handle a sedentary desk job in view of his permanent disabilities. In view of his lack of educational qualifications, the plaintiff would at best be able to get a job that pays RM300 per month. This partial future loss or post-trial loss of earnings would be RM300 x 163 months, that is, RM48,900.

[19] In the premises, and for the reasons stated, the appeal is allowed to the extent as set out in the foregoing. The plaintiff is entitled to costs assessed at RM6,000 in the High Court and costs in the sessions court according to the scale. Deposit to be refunded to the plaintiff/appellant.

Appeal allowed.

Reported by Ibnu Aswan